

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

**IN RE: BLUE CROSS BLUE SHIELD  
ANTITRUST LITIGATION  
(MDL No. 2406)**

**Master File No. 2:13-CV-20000-RDP**

**This document relates to Provider-  
Track cases.**

**DEFENDANTS' REPORT ON ISSUES THAT REQUIRE RESOLUTION  
BEFORE REMAND**

Based on the Court's direction during the May 16, 2022 Status Conference, the Blues anticipated submitting a joint report laying out their respective positions on the issues that should be resolved by the Court before the Provider-track cases transferred to MDL No. 2406 for pre-trial purposes may be remanded to their transferor jurisdictions. (Doc. 2921 (5/16/22 Hr'g Tr.) at 14:23–18:5.) While the Blues were in the process of sending their portion of the joint report to Providers, we learned that Providers filed separately. (*See* Doc. 2925.) As such, the Blues now respectfully submit their position.

Specifically, the Blues believe that the Court should take the following steps before considering any of the coordinated cases to be ripe for remand:

1. The Court should issue a decision on the motions that the Blues and Providers have asked the Court to prioritize and to resolve in the near-term. (Doc. 2921 (5/16/22 Hr'g Tr.) at 13:16–22.) These motions are (i) the Providers' Motion for Class Certification and related motions (*i.e.*, *Daubert* motions) (Docs. 2604–05, 2642 (Class Certification Brs.); Docs. 2466, 2471, 2476, 2478, 2480, 2631–36, 2639, 2665–66, 2668, 2690–92, 2695, 2707–10 (*Daubert* Mots.)); (ii) the Blues' Standard of Review Motion for a standard of review with respect to ESAs alone (Docs. 2727–28, 2747, 2772); and

(iii) Providers' Standard of Review Motion for a standard of review with respect to their group boycott claims (Docs. 2729, 2760, 2770).

2. The Court should issue a decision on the other pending motions for summary judgment filed to date, which are (i) the Blues' Motion for Summary Judgment on All Claims Advanced by Non-General Acute Care Hospital Providers and Any Claims Based on Blue System Rules Other than ESAs or BlueCard for Failure to Demonstrate Injury or Damages (Docs. 2750–51, 2797, 2819); (ii) the Blues' Motion for Summary Judgment on Providers' Damages Claims as Time-Barred and Speculative (Docs. 2761–62, 2798, 2823); (iii) the Providers' Motion for Partial Summary Judgment on the Blues' Claim to Common-Law Trademark Rights (Docs. 2749, 2800, 2821); and (iv) the Providers' Motion for Partial Summary Judgment on the Blues' Single Entity Defense (Docs. 2748, 2801, 2820).

3. Once all summary judgment motions are decided, the parties should be afforded an opportunity to file, and the Court should resolve, any motions for summary judgment contingent on class certification consistent with the Court's operative Eighth Amended Scheduling Order. Specifically, when inviting the parties to file the currently pending motions, the Court directed the parties to limit their motions to those that "are not critically dependent on the outcome of class certification." (Doc. 2767 (Order Modifying Eighth Am. Scheduling Order).) Thus, depending on the Court's ruling on class certification, there may be further summary judgment grounds that should be resolved prior to remand. (*See* Doc. 2757 (Defs.' Notice of Other Potential Mots.); *see also* Doc. 2458 (6/20/2019 Hr'g Tr.) at 8:14–24 (The Court: "[D]epending on what class is certified, it may or may not change significantly the motion practice; but we can't

know that until we actually see what's certified. . . . I can see where what class gets certified perhaps, particularly on the provider side, may speak to questions like demonstrable harm, the market definition that gets played out on a rule-of-reason analysis, all sorts of things like that.”.)

4. Given the extensive, multi-year discovery conducted in this case to date, the Blues disagree with Providers that discovery should be reopened as to any issue. Providers, however, have stated that further discovery may be required, including regarding the effects of eliminating the National Best Efforts rule (“NBE”). (Doc. 2918 (Pls.’ Notice of Supp’l Auth.) at 2–3; Doc. 2924 (Pls.’ Supp’l Auth. Reply) at 1.) NBE was a Subscriber-facing rule for which Providers have claimed no damages (*see, e.g.*, Doc. 2772 at 13–15), and the Blues disagree that additional discovery on this topic is warranted. However, to the extent the Court permits additional discovery on that (or any other) issue, such discovery should be coordinated within the MDL prior to remand.

5. It is premature to set a trial date now, given that resolution of the numerous outstanding issues outlined above could impact the need, contours and timing of any trial. Accordingly, the parties should meet and confer at an appropriate time about trial scheduling issues, including whether there is any issue that should be tried ahead of remand based on the rulings received to date. For instance, it may make sense to resolve in advance of remand the common issue of whether the Blues are a single entity for purposes of governing the federally registered Blue marks. Resolution of this issue could significantly streamline the scope of the remaining litigation (indeed, the Blues maintain that this issue will foreclose remaining Section 1 claims altogether).

As to Providers' suggestion that they may seek to amend their complaint, this request implicates Federal Rules of Civil Procedure 15 and 23. It is premature to determine whether an amended complaint is warranted, particularly since it is unclear what amendments Providers are considering more than a decade into this case. As such, Providers should propose the specific amendments they seek to make, following which the parties should meet and confer.<sup>1</sup>

---

<sup>1</sup> As to Providers' suggestion that the Court should enter an order establishing a common benefit fund, the Blues reserve their right to address that issue at the appropriate time. In no event should establishment of a common benefit fund impact or burden Defendants in any way.

Dated: June 16, 2022

Respectfully submitted,

/s/ Evan R. Chesler

Evan R. Chesler

Christine A. Varney

Karin A. DeMasi

Lauren R. Kennedy

Helam Gebremariam

David H. Korn

CRAVATH, SWAINE & MOORE

LLP

Worldwide Plaza

825 Eighth Avenue

New York, NY 10019

Tel: (212) 474-1000

Fax: (212) 474-3700

echesler@cravath.com

cvarney@cravath.com

kdemasi@cravath.com

lkennedy@cravath.com

hgebremariam@cravath.com

dkorn@cravath.com

*Coordinating Counsel for Defendant  
Blue Cross and Blue Shield  
Association; Counsel for Defendants  
Blue Cross and Blue Shield of  
Alabama; Blue Cross Blue Shield of  
Arizona; Blue Cross and Blue Shield  
of Florida, Inc.; Blue Cross and  
Blue Shield of Massachusetts, Inc.;  
Blue Cross and Blue Shield of North  
Carolina, Inc.; BlueCross  
BlueShield of Tennessee, Inc.;  
California Physicians' Service d/b/a  
Blue Shield of California;  
CareFirst, Inc.; CareFirst of  
Maryland, Inc.; Group  
Hospitalization and Medical  
Services, Inc.; CareFirst  
BlueChoice, Inc.; Hawaii Medical  
Service Association (Blue Cross and  
Blue Shield of Hawaii); Health Care  
Service Corporation, an Illinois  
Mutual Legal Reserve Company,  
including its divisions Blue Cross  
and Blue Shield of Illinois, Blue*

*Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa)*

Craig A. Hoover  
E. Desmond Hogan  
Justin Bernick  
Peter Bisio  
Elizabeth Jose  
HOGAN LOVELLS US LLP  
Columbia Square  
555 13th Street, N.W.  
Washington, DC 20004  
Tel: (202) 637-5600  
Fax: (202) 637-5910  
craig.hoover@hoganlovells.com  
desmond.hogan@hoganlovells.com  
justin.bernick@hoganlovells.com  
peter.bisio@hoganlovells.com  
elizabeth.jose@hoganlovells.com

*Counsel for Anthem, Inc., f/k/a WellPoint, Inc., and all of its named subsidiaries in this consolidated action; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence Blue Shield of Idaho; Regence Blue Cross Blue Shield of Utah;*

David J. Zott, P.C.  
Daniel E. Laytin, P.C.  
Sarah J. Donnell  
Christa C. Cottrell, P.C.  
Zachary Holmstead  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Tel: (312) 862-2000  
Fax: (312) 862-2200  
david.zott@kirkland.com  
daniel.laytin@kirkland.com  
sarah.donnell@kirkland.com  
christa.cottrell@kirkland.com  
zachary.holmstead@kirkland.com

*Counsel for Blue Cross Blue Shield Association*

Kimberly R. West (Liaison Counsel)  
Mark M. Hogewood  
WALLACE, JORDAN, RATLIFF  
& BRANDT, LLC  
First Commercial Bank Building  
800 Shades Creek Parkway, Suite  
400  
Birmingham, AL 35209  
Tel: (205) 870-0555  
Fax: (205) 871-7534  
kwest@wallacejordan.com

*Regence Blue Shield (of Washington);  
Regence Blue Cross Blue Shield of  
Oregon*

John D. Martin  
Lucile H. Cohen  
Travis A. Bustamante  
NELSON MULLINS RILEY &  
SCARBOROUGH LLP  
1320 Main Street, 17th Floor  
Columbia, SC 29201  
Tel: (803) 255-9421  
Fax: (803) 256-7500  
john.martin@nelsonmullins.com  
lucie.cohen@nelsonmullins.com  
travis.bustamante@nelsonmullins.com

*Counsel for Anthem, Inc., f/k/a WellPoint, Inc., and all of its named subsidiaries in this consolidated action; Blue Cross and Blue Shield of North Carolina, Inc.; Louisiana Health Service & Indemnity Company (Blue Cross and Blue Shield of Louisiana); BCBSM, Inc. (Blue Cross and Blue Shield of Minnesota); Blue Cross and Blue Shield of South Carolina; Horizon Healthcare Services, Inc. (Horizon Blue Cross and Blue Shield of New Jersey); Blue Cross & Blue Shield of Rhode Island; Blue Cross and Blue Shield of Vermont; Cambia Health Solutions, Inc.; Regence Blue Shield of Idaho; Regence Blue Cross Blue Shield of Utah; Regence Blue Shield (of Washington); Regence Blue Cross Blue Shield of Oregon; Blue Cross & Blue Shield of Mississippi, a Mutual Insurance Company; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Triple-S Salud, Inc.; Defendants Blue Cross and Blue Shield of Florida, Inc.; Blue Cross*

mhogewood@wallacejordan.com

*Counsel for Defendants Blue Cross Blue Shield Association; Blue Cross Blue Shield of Arizona; CareFirst, Inc.; CareFirst of Maryland, Inc.; Group Hospitalization and Medical Services, Inc.; Health Care Service Corporation, an Illinois Mutual Legal Reserve Company, including its divisions Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of Texas, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Oklahoma, and Blue Cross and Blue Shield of Montana; Caring for Montanans, Inc., f/k/a Blue Cross and Blue Shield of Montana, Inc.; Highmark Inc., f/k/a Highmark Health Services; Highmark West Virginia Inc.; Highmark Blue Cross Blue Shield Delaware Inc.; California Physicians' Service d/b/a Blue Shield of California; Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii)*

Carl S. Burkhalter  
John Thomas A. Malatesta, III  
MAYNARD COOPER & GALE PC  
1901 6th Avenue North, Suite 2400  
Regions Harbert Plaza  
Birmingham, AL 35203  
Tel: (205) 254-1000  
Fax: (205) 254-1999  
cburkhalter@maynardcooper.com  
jmalatesta@maynardcooper.com

Pamela B. Slate  
HILL CARTER FRANCO COLE &

*and Blue Shield of Massachusetts, Inc.;  
BlueCross BlueShield of Tennessee, Inc.*

Cavender C. Kimble  
BALCH & BINGHAM LLP  
1901 6th Avenue North, Suite 1500  
Birmingham, AL 35203-4642  
Tel: (205) 226-3437  
Fax: (205) 488-5860  
ckimble@balch.com

*Counsel for Anthem, Inc., f/k/a WellPoint,  
Inc., and all of its named subsidiaries in  
this consolidated action; Blue Cross and  
Blue Shield of North Carolina, Inc.;  
Louisiana Health Service & Indemnity  
Company (Blue Cross and Blue Shield of  
Louisiana); BCBSM, Inc. (Blue Cross and  
Blue Shield of Minnesota); Blue Cross  
and Blue Shield of South Carolina;  
Horizon Healthcare Services, Inc.  
(Horizon Blue Cross and Blue Shield of  
New Jersey); Blue Cross & Blue Shield of  
Rhode Island; Blue Cross and Blue Shield  
of Vermont; Cambia Health Solutions,  
Inc.; Regence Blue Shield of Idaho;  
Regence Blue Cross Blue Shield of Utah;  
Regence Blue Shield (of Washington);  
Regence Blue Cross Blue Shield of  
Oregon*

Gwendolyn Payton  
KILPATRICK TOWNSEND &  
STOCKTON LLP  
1420 Fifth Avenue, Suite 3700  
Seattle, WA 98101  
Tel: (206) 626-7714  
Fax: (206) 299-0414  
gpayton@kilpatricktownsend.com

*Counsel for Defendants Premera Blue  
Cross, d/b/a Premera Blue Cross Blue  
Shield of Alaska*

Brian K. Norman

BLACK, P.C.  
425 South Perry Street  
Montgomery, AL 36104  
Tel: (334) 834-7600  
Fax: (334) 386-4381  
pslate@hillhillcarter.com

*With Cravath, Swaine & Moore  
LLP, counsel for Defendant Blue  
Cross Blue Shield of Alabama*

Helen E. Witt, P.C.  
Jeffrey J. Zeiger, P.C.  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Tel: (312) 862-2000  
Fax: (312) 862-2200  
hwitt@kirkland.com  
jzeiger@kirkland.com

*Counsel for Defendants Health Care  
Service Corporation, an Illinois  
Mutual Legal Reserve Company,  
including its divisions Blue Cross  
and Blue Shield of Illinois, Blue  
Cross and Blue Shield of Texas,  
Blue Cross and Blue Shield of New  
Mexico, Blue Cross and Blue Shield  
of Oklahoma, and Blue Cross and  
Blue Shield of Montana; Caring for  
Montanans, Inc., f/k/a Blue Cross  
and Blue Shield of Montana, Inc.;  
Highmark Inc., f/k/a Highmark  
Health Services; Highmark West  
Virginia Inc.; Highmark Blue Cross  
Blue Shield Delaware Inc.;  
Highmark Western and  
Northeastern New York Inc.*

Jonathan M. Redgrave  
REDGRAVE, LLP  
14555 Avion Parkway, Suite 275  
Chantilly, VA 20151  
Tel: (703) 592-1155



SHAMOUN & NORMAN, LLP  
1800 Valley View Lane, Suite 200  
Farmers Branch, TX 75234  
Tel: (214) 987-1745  
Fax: (214) 521-9033  
bkn@snlegal.com

H. James Koch  
ARMBRECHT JACKSON LLP  
RSA Tower, 27th Floor  
11 North Water Street  
Mobile, AL 36602  
Tel: (251) 405-1300  
Fax: (251) 432-6843  
hjk@ajlaw.com

*Counsel for Defendants CareFirst, Inc.;  
CareFirst of Maryland, Inc.; Group  
Hospitalization and Medical Services,  
Inc.; CareFirst BlueChoice, Inc.*

R. David Kaufman  
M. Patrick McDowell  
BRUNINI, GRANTHAM, GROWER  
& HEWES, PLLC  
190 East Capitol Street  
The Pinnacle Building, Suite 100  
Jackson, MS 39201  
Tel: (601) 948-3101  
Fax: (601) 960-6902  
dkaufman@brunini.com  
pmcdowell@brunini.com

Cheri D. Green  
BLUE CROSS & BLUE SHIELD OF  
MISSISSIPPI, A MUTUAL  
INSURANCE COMPANY  
P.O. Box 1043  
Jackson, MS 39215  
Tel: (601) 932-3704  
cdgreen@bcbsms.com

*Counsel for Defendant Blue Cross & Blue  
Shield of Mississippi, a Mutual Insurance  
Company*

Fax: (612) 332-8915  
jredgrave@redgravellp.com

*Additional Counsel for HCSC and  
Highmark Defendants*

Todd M. Stenerson  
Brian C. Hauser  
SHEARMAN & STERLING LLP  
401 9th Street, N.W., Suite 800  
Washington, DC 20004  
Tel: (202) 508-8000  
Fax: (202) 508-8100  
todd.stenerson@shearman.com  
brian.hauser@shearman.com

Sarah L. Cylkowski  
Thomas J. Rheume, Jr.  
BODMAN PLC  
1901 Saint Antoine Street  
6th Floor at Ford Field  
Detroit, MI 48226  
Tel: (313) 259-7777  
Fax: (734) 930-2494  
scylkowski@bodmanlaw.com  
trheume@bodmanlaw.com

Andy P. Campbell  
A. Todd Campbell  
Yawanna N. McDonald  
CAMPBELL PARTNERS LLC  
505 North 20th Street, Suite 1600  
Birmingham, AL 35203  
Tel: (205) 224-0750  
Fax: (205) 224-8622  
andy@campbellpartnerslaw.com  
todd@campbellpartnerslaw.com  
yawanna@campbellpartnerslaw.com

*Counsel for Defendant Blue Cross  
and Blue Shield of Michigan*

John Briggs  
Rachel Adcox  
Jeny M. Maier

Michael A. Naranjo  
FOLEY & LARDNER LLP  
555 California Street, Suite 1700  
San Francisco, CA 94104  
Tel: (415) 984-9847  
Fax: (415) 434-4507  
mnaranjo@foley.com

Alan D. Rutenberg  
Benjamin R. Dryden  
FOLEY & LARDNER LLP  
3000 K Street, N.W., Suite 600  
Washington, DC 20007  
Tel: (202) 672-5300  
Fax: (202) 672-5399  
arutenberg@foley.com  
bdryden@foley.com

*Counsel for Defendant US Able Mutual  
Insurance Company, d/b/a Arkansas Blue  
Cross and Blue Shield*

Robert K. Spotswood  
Michael T. Sansbury  
Joshua K. Payne  
Jess R. Nix  
Morgan B. Franz  
SPOTSWOOD SANSOM &  
SANSBURY LLC  
Financial Center  
505 20th Street North, Suite 700  
Birmingham, AL 35203  
Tel: (205) 986-3620  
Fax: (205) 986-3639  
rks@spotswoodllc.com  
msansbury@spotswoodllc.com  
jpayne@spotswoodllc.com  
jnix@spotswoodllc.com  
mfranz@spotswoodllc.com

*Counsel for Defendant Capital BlueCross*

Robert R. Riley, Jr.  
RILEY & JACKSON, P.C.  
3530 Independence Drive

AXINN, VELTROP &  
HARKRIDER, LLP  
1901 L Street, N.W.  
Washington, DC 20036  
Tel: (202) 912-4700  
Fax: (202) 912-4701  
jbriggs@axinn.com  
radcox@axinn.com  
jmaier@axinn.com

Stephen A. Rowe  
Aaron G. McLeod  
ADAMS AND REESE LLP  
Regions Harbert Plaza  
1901 6th Avenue North, Suite 3000  
Birmingham, AL 35203  
Tel: (205) 250-5000  
Fax: (205) 250-5034  
steve.rowe@arlaw.com  
aaron.mcleod@arlaw.com

*Counsel for Defendant  
Independence Hospital Indemnity  
Plan, Inc. f/k/a Independence  
Blue Cross*

Kathleen Taylor Sooy  
Tracy A. Roman  
CROWELL & MORING LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
Tel: (202) 624-2500  
Fax: (202) 628-5116  
ksooy@crowell.com  
troman@crowell.com

Sarah Gilbert  
Honor Costello  
CROWELL & MORING LLP  
590 Madison Avenue, 20th Floor  
New York, NY 10022  
Tel: (212) 223-4000  
Fax: (212) 223-4134  
sgilbert@crowell.com  
hcostello@crowell.com

Birmingham, AL 35209  
Tel: (205) 879-5000  
Fax: (205) 879-5901  
rob@rileyjacksonlaw.com

*Counsel for Defendants Blue Cross and Blue Shield of Florida, Inc.; Blue Cross and Blue Shield of Massachusetts, Inc.; BlueCross BlueShield of Tennessee, Inc.*

Edward S. Bloomberg  
John G. Schmidt Jr.  
Anna Mercado Clark  
PHILLIPS LYTLE LLP  
One Canalside  
125 Main Street  
Buffalo, NY 14203  
Tel: (716) 847-8400  
Fax: (716) 852-6100  
ebloomberg@phillipslytle.com  
jschmidt@phillipslytle.com  
aclark@phillipslytle.com

Stephen A. Walsh  
WEINBERG, WHEELER, HUDGINS,  
GUNN & DIAL  
100 Corporate Parkway  
One Lake Level  
Birmingham, AL 35242  
Tel: (205) 572-4107  
Fax: (205) 572-4199  
swalsh@wwhgd.com

*Counsel for Defendant, Excellus Health Plan, Inc., d/b/a Excellus BlueCross BlueShield, incorrectly sued as Excellus BlueCross BlueShield of New York*

John M. Johnson  
Brian P. Kappel  
LIGHTFOOT FRANKLIN &  
WHITE LLC  
The Clark Building  
400 20th Street North  
Birmingham, AL 35203  
Tel: (205) 581-0700  
Fax: (205) 581-0799  
jjohnson@lightfootlaw.com  
bkappel@lightfootlaw.com

*Counsel for Defendants Blue Cross of Idaho Health Service, Inc.; Blue Cross and Blue Shield of Kansas, Inc.; Blue Cross and Blue Shield of Kansas City; Blue Cross and Blue Shield of Nebraska; Blue Cross Blue Shield of North Dakota; Blue Cross Blue Shield of Wyoming*

David J. Zott, P.C.  
Daniel E. Laytin, P.C.  
KIRKLAND & ELLIS LLP  
300 North LaSalle  
Chicago, IL 60654  
Tel: (312) 862-2000  
Fax: (312) 862-2200  
david.zott@kirkland.com  
daniel.laytin@kirkland.com

*Counsel for Defendants Wellmark of South Dakota, Inc. (Wellmark Blue Cross and Blue Shield of South Dakota); Wellmark, Inc. (Wellmark Blue Cross and Blue Shield of Iowa); Hawaii Medical Service Association (Blue Cross and Blue Shield of Hawaii); Triple-S Salud, Inc.*

**CERTIFICATE OF SERVICE**

I hereby certify that on June 16, 2022, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Evan R. Chesler  
Evan R. Chesler